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Bowen v. United States Postal Service, ____ U.S. ____, 103 S. Ct. 588 (1983)

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CASE NOTES

Labor Law—APPORTIONMENT OF DAMAGES BETWEEN EMPLOYER AND UNION—THE SUPREME COURT'S RECESSION FROM "THE GOVERNING PRINCIPLE"—*Bowen v. United States Postal Service*, ___ U.S. ___, 103 S. Ct. 588 (1983)

I. INTRODUCTION

After sixteen years of questionable development in the hands of the United States Supreme Court, the concept of apportionment of damages between employer and union has finally achieved some measure of rational clarification in *Bowen v. United States Postal Service*.[1] Since 1967, the federal courts have taken a number of approaches to the principle which was first enunciated in *Vaca v. Sipes*.[2] Ostensibly, the principle was intended to be a simple one. In an employee's suit against both his employer and his union—where the employer had violated the terms of the collective bargaining agreement, and the union had breached its duty of fair representation—liability would be apportioned between codefendants according to fault. As Justice White had written in *Vaca*:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.[3]

However, the facial simplicity of *Vaca*'s "governing principle" is misleading, particularly when one considers the variety of interpretations that have been handed down by the lower courts in the wake of that ruling.[4] The *Vaca* decision involved much more than

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1. ___ U.S. ___, 103 S. Ct. 588 (1983).
2. 386 U.S. 171 (1967).
3. *Id.* at 197-98.
4. As one commentator has pointed out: "The lower courts [have not been] afforded the luxury of ignoring as practical and important a question as the proper application of the *Vaca* apportionment standard." As a result, "lower courts have assessed all damages against the employer, assessed all damages against the union, and assessed damages jointly against both." Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving a Union's Breach of Its Duty of Fair Representation*, 30 MER-

the mere apportionment of damages between two wrongdoers in a contract or tort action—indeed, the principle quoted above was handed down as a relative afterthought in the closing paragraphs of the opinion. The central thrust of *Vaca* and its progeny, rather, was to focus on the balance of interests between the employee and his employer and his union under the terms of the collective bargaining agreement. As a remedial measure designed to reinforce the goals of federal labor policies, the principle of apportionment of damages has necessarily reflected much of the Court's attitude in its approach to labor relationships. The underlying rationale of that approach has not always followed convincingly from the language it has claimed to support.

In reality, and despite the Court's explicit emphasis on apportionment, the *Vaca* rationale had imposed exclusive liability on the employer for all of the employee's lost wages accruing from the time of his wrongful discharge.[5] The union's liability, on the other hand, had been limited solely to the expenses of litigation incurred by the employee as a result of being forced into court by the union's breach of its duty of fair representation.[6] If this was indeed a determination of liability "according to the damage caused by the fault of each,"[7] then it was also grounded in a concept of "fault" which had been predetermined by the Supreme Court, and which bordered on strict liability for the employer.[8]

In *Bowen*, however, through the use of a hypothetical arbitration date at which the employee would have been reinstated had the union properly processed his grievance,[9] the Court has restructured the apportionment of damages in such a manner as to hold the union responsible for the additional backpay the employee would have earned but for the union's breach of duty.[10] The Court, in essence, has turned *Vaca*'s "governing principle" on its head without changing so much as a word of its original language.

CER L. REV. 661, 672-73 (1979) (footnotes omitted).

This note will deal exclusively with decisions of the United States Supreme Court. For discussions of the *Vaca* standard as applied in the lower courts, as well as of the development of the standard itself, see *id.* at 670-78, and Martucci, *Employer Liability for Union Unfair Representation: The Judicial Predilection and Underlying Policy Considerations*, 46 MO. L. REV. 78, 95-100, 104-12 (1981).

5. *See, e.g.*, Bowen v. United States Postal Serv., 642 F.2d 79, 82 (4th Cir. 1981), *rev'd*, 103 S. Ct. 588 (1983).

6. Czosek v. O'Mara, 397 U.S. 25, 29 (1970).

7. *Vaca*, 386 U.S. at 197.

8. *See* Martucci, *supra* note 4, at 114-15.

9. *See infra* note 95 and accompanying text.

10. *Bowen*, 103 S. Ct. at 595.

This note will provide a brief overview of the section 301/fair representation suits under which the "governing principle" arose, and will trace the Supreme Court's development of that principle from its inception in *Vaca* to its apparent demise in *Bowen*.

II. Origins of Liability

The procedural and substantive mechanics of the type of suit under discussion have developed in measured stages over the better part of the last four decades. When viewed against the overall complexities of American labor law, of course, the remedial issues which have been resolved in *Bowen* are merely a small part of a much larger concern—the resolution of employee grievances in the courts when internal grievance procedures have failed their purpose. In quite another sense, however, *Bowen* represents a welcome conclusion to an important segment of the Court's ongoing struggle to accommodate the competing interests in disputes between the parties to a bargaining agreement. For the purpose of this discussion, then, a brief outline of the sources of liability of union and employer is necessary to fully appreciate the rationale which supports the Court's decision in *Bowen*.

A. The Duty of Fair Representation

The idea of a union's duty of fair representation was first articulated by the Court in *Steele v. Louisville & Nashville Railroad.*[11] Steele, a black employee of the railroad, brought suit against both his employer and the union over a discriminatory hiring agreement. The Alabama Supreme Court ruled that, under the Railway Labor Act (RLA),[12] the union was under no duty whatsoever to preserve the rights of the craft's minority members, despite the fact that the RLA conferred exclusive authority on the union to represent the employees in their dealings with the railroad.[13] In fact, such an interpretation was technically correct. Neither the RLA nor, for that matter, the National Labor Relations Act (NLRA)[14] contained any express language which established such a duty.

Nevertheless, the United States Supreme Court held that such power could not be conferred on the union without imposing a re-

11. 323 U.S. 192 (1944).
12. Ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151-188 (1976)).
13. Steele v. Louisville & Nashville R.R., 16 So. 2d 416 (Ala.), *rev'd*, 323 U.S. 192 (1944).
14. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).

ciprocal duty to represent all of the members of a craft "without hostile discrimination, fairly, impartially, and in good faith."[15] To hold otherwise, said the Court, would serve only to contravene the purpose of the RLA, which was, in short, to avoid commercial and industrial strife by encouraging the prompt and orderly settlement of labor disputes.[16] Little would be accomplished, wrote Justice Stone, if the interests of the minority were ignored at the bargaining table. "The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid."[17] The intent of Congress in passing the Act, therefore, could not have been to bestow such power on a union without imposing on it any obligation to protect the interests of those it represented.[18] Thus, the statutory grant of a union's authority carried with it the corresponding "statutory" duty of fair representation, and would be subject "to the usual judicial remedies of injunction and award of damages" in the event of a union's breach.[19]

Steele and its companion case, *Tunstall v. Brotherhood of Locomotive Firemen*,[20] dealt primarily with the issue of racial discrimination as it had arisen under the framework of the RLA. However, another ruling issued on the same day, *Wallace Corp. v. NLRB*,[21] made reference to the duty by way of dictum, and signaled that the Court did not intend to restrict the application of the duty solely to circumstances involving racial discrimination.[22]

When the Court finally moved to consider the scope of the duty in an area other than racial discrimination, the result was an opinion which served to broaden the union's discretion rather than its responsibilities. In 1953, the Court held in *Ford Motor Co. v. Huffman*[23] that, just as the union's statutory authority was not absolute, neither, accordingly, was its duty of fair representation.[24] In a suit brought under the NLRA, the plaintiff-employee had sought injunctive relief against his employer and union over the seniority

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15. *Steele*, 323 U.S. at 204.

16. *See id.* at 199-200. This general theme appears throughout many of the Court's decisions in this area. *See, e.g.*, Republic Steel v. Maddox, 379 U.S. 650, 653 (1965) (construing Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1976)).

17. *Steele*, 323 U.S. at 200.

18. *Id.* at 199.

19. *Id.* at 207. *See infra* notes 30-31 and accompanying text.

20. 323 U.S. 210 (1944). *Tunstall* extended federal jurisdiction to cover nondiversity suits brought by employees under the RLA.

21. 323 U.S. 248 (1944).

22. *Id.* at 255.

23. 345 U.S. 330 (1953).

24. *Id.* at 337-38.

provisions of the bargaining agreement. The provisions in question had operated to lower the seniority status of the plaintiff in deference to the preemployment military service of other returning veterans of World War II.[25] The employee framed his arguments, however, not in terms of the union's duty of fair representation, but rather in the form of a challenge to the union's statutory authority under the NLRA.[26] Thus, while the Court's opinion focused in a technical sense on whether the union's conduct constituted an unfair labor practice,[27] the decision nevertheless served to sketch out the extent of discretion which a union would be afforded in its representation of employee interests.

The Court acknowledged the existence of the union's duty as set forth in *Steele* under the "comparable provisions" of the RLA,[28] but went on to caution that any enforcement of the duty must be kept within the bounds of reason:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. . . . The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[29]

Huffman and *Steele,* as decisions handed down during the early stages of the development of the duty of fair representation, shared two common characteristics. First, the plaintiff in each case had sought relief against the employer primarily in the form of injunctive action.[30] This was due in some measure to the nature of the second shared feature, which was simply that the cause of action in each case had been based on the execution and validity of the particular bargaining agreement rather than on the defendant's administration of its terms. As such, the employee's interests, at

25. *Id.* at 334-35.
26. *Id.* at 332.
27. *Id.* at 332 n.4.
28. *Id.* at 337 (citing *Steele,* 323 U.S. at 198-99).
29. *Huffman,* 345 U.S. at 337-38.
30. *See* Linsey, *supra* note 4, at 664. The injunctive character of relief sought against the employers in these early cases served to forestall any opportunity for the Court to discuss apportionment. *Id.* at 665.

least as far as his employer was concerned, centered largely on enjoining the employer from enforcing the agreement.[31] However, as the subject of these disputes shifted in later years to questions involving the administration of the bargaining agreement,[32] and finally to proceedings involving arbitration,[33] the employer's liability for damages under section 301 of the Labor Management Relations Act[34] gradually consumed an increasing amount of the Supreme Court's attention.

B. Employer Liability Under Section 301

The substantive scope and intent of section 301 was addressed at some length in *Textile Workers Union v. Lincoln Mills.*[35] In an affirmative response to a union's suit to compel arbitration, the Court held that section 301 not only granted jurisdiction to the federal courts over labor contract disputes, but provided the courts with a broad source of substantive law as well. "[T]he substantive law to apply in suits under § 301(a)," wrote Justice Douglas, "is federal law, which the courts must fashion from the policy of our national labor laws."[36]

The suit in *Lincoln Mills,* of course, had been brought by the union itself, rather than by an individual employee. Whether section 301 would allow a suit by the latter, the Court cautioned, was a question the case did not present.[37]

In 1962, however, the Court held that such a suit was indeed within the coverage of the statute. In *Smith v. Evening News Association,*[38] an employee brought suit against his employer as a result of the company's discrimination against members of the employee's union. During a strike against the company by another union, the employer had continued to employ nonunion workers while refusing to allow the petitioner and other members of his union to report for work.[39] Before *Evening News,* the union member would have been required by the preemption doctrine of *San*

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31. *Id.*
32. *See, e.g.,* Humphrey v. Moore, 375 U.S. 335 (1964); Conley v. Gibson, 355 U.S. 41 (1957).
33. *See, e.g.,* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
34. 29 U.S.C. § 185 (1976).
35. 353 U.S. 448 (1957).
36. *Id.* at 456.
37. *Id.* at 459 n.9.
38. 371 U.S. 195 (1962).
39. *Id.* at 196.

Diego Building Trades Council v. Garmon[40] to bring his complaint before the National Labor Relations Board (NLRB). In fact, the petitioner's suit had been dismissed in the state courts of Michigan on the very grounds that, as an unfair labor practice, the conduct the petitioner alleged fell within the NLRB's exclusive jurisdiction.[41]

Writing for a majority of the Court, Justice White rejected the employer's argument that only the union could bring suit under section 301:

> Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.[42]

Because the contract in *Evening News* had contained no grievance arbitration procedure,[43] the issue of whether an employee would have to utilize such alternatives before seeking relief under section 301 was not addressed until the Court's decision in *Republic Steel Corp. v. Maddox*.[44]

The employee in *Republic Steel* had been permanently laid off when his employer closed down a mine. Without making any attempt to seek redress under the bargaining agreement's established grievance procedure, the employee filed a court suit against his employer for the severance pay which had been promised him under the terms of the contract.[45] Pointing out that Congress had "expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant,"[46] the Court held that an individual employee must at

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40. 359 U.S. 236 (1959). The *Garmon* preemption doctrine stated that if a disputed activity was "arguably" an unfair labor practice as defined by the NLRA, the courts must then defer to the jurisdiction of the NLRB. *Id.* at 245. *See also* 29 U.S.C. § 158 (1976) (defining unfair labor practices).

41. *Evening News*, 371 U.S. at 196.

42. *Id.* at 200.

43. *Id.* at 196 n.1.

44. 379 U.S. 650 (1965).

45. *Id.* at 651.

46. *Id.* at 653. Section 203(d) of the Labor Management Relations Act reads in relevant

least attempt to exhaust the contract grievance procedures before resorting to the courts for relief.[47]

The *Republic Steel* decision represents something of a turning point in the Court's method of analyzing the interests of affected parties. Until that decision, the relative simplicity of an employee's suit against either his employer or his union had required little from the Court in the way of specific-interest analysis. To be sure, the Court's opinions in *Steele* and *Huffman* had clearly emphasized the interdependent relationship between a union's duty of fair representation and the interests of the employees for whom it bargained. Similarly, the Court in *Evening News* had given at least a measure of attention to the connection between union interests and individual claims when such claims were brought against an employer. But *Republic Steel* had presented the Court with a problem that required a further refinement of its method of analysis. As mentioned earlier, the Court had avoided the necessity of addressing the exhaustion issue in *Evening News* because, under the bargaining contract, there had been no grievance procedure to which the employee could have turned for relief. The presence of such a procedure in *Republic Steel* had obliged the Court to be a bit more discriminating in its identification of affected interests.

Examining those interests from a practical point of view, Justice Harlan stated:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees.[48]

As for the employer and employee:

> Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it can-

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part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 173(d) (1976).

47. *Republic Steel*, 379 U.S. at 652.

48. *Id.* at 653.

> not be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.[49]

Stated differently, the preferential status of arbitration over resort to the courts would continue to be the standard against which all three subsidiary interests—those of the employee, his employer and his union—would be measured. As long as those interests could be easily identified and isolated as separate entities, the appropriate allocation of liability could be balanced with a reasonable degree of efficiency.[50] When those interests converged in something more than a merely rhetorical sense, however, as they would after *Vaca*, the question of the proper apportionment of liability would arise as an altogether more demanding issue.

III. *Vaca v. Sipes:* The Inception of the Apportionment Principle

Vaca involved a suit brought by an employee against his union for the breach of its duty of fair representation. The dispute arose as a result of the union's refusal to take the employee's grievance through to arbitration after the employee had been permanently discharged from his job at Swift & Company's packing house in Kansas City. Owens, the employee, had returned to work after recovering from an extended illness. The company doctor had examined Owens upon his return, and had found his blood pressure too high to allow reinstatement. Owens insisted that examinations by outside doctors indicated otherwise, and that he was indeed fit for work. He requested his union to initiate grievance procedures in his behalf.[51]

After complying with Owens' request and processing the grievance into the fourth step of the agreed upon procedure,[52] the union

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49. *Id.*

50. *See* Martucci, *supra* note 4, at 113-14.

51. Vaca v. Sipes, 386 U.S. 171, 174-76 (1967).

52. *Id.* at 175 n.3. With some variation in the number of steps, the grievance procedure in the agreement between Swift and the union appears to have been fairly typical. As described by Justice White:

> The agreement created a five-step procedure for the handling of grievances. In steps one and two, either the aggrieved employee or the Union's representative presents the grievance first to Swift's department foreman, and then in writing to the division superintendent. In step three, grievance committees of the Union and management meet, and the company must state its position in writing to the

arranged for yet another medical examination in order to supplement its case. When the examination report offered conclusions which failed to support Owens' position, the union's executive board voted to suspend the grievance, and recommended to Owens that he accept the company's "offer of referral to a rehabilitation center."[53] Owens then brought suit against the union in a Missouri state court, charging that the union had "'arbitrarily, capriciously and without just or reasonable reason or cause' refused to take his grievance with Swift to arbitration."[54] In overturning the lower courts' rulings that the breach of a union's duty of fair representation was arguably an unfair labor practice—and therefore within the exclusive jurisdiction of the NLRB[55]—the Missouri Supreme Court ruled that such a suit could indeed be brought in court, and reinstated the jury verdict which the trial judge had denied Owens.[56]

The Supreme Court granted certiorari to determine "whether exclusive jurisdiction [lay] with the NLRB and, if not, whether the finding of Union liability and the relief afforded Owens [were] consistent with governing principles of federal labor law."[57] In pursuit of the answers to the latter question, the Court set forth a number of significant propositions concerning the conditions under which an employee might seek relief against his employer and his union under section 301. When the dust finally cleared, the position of both the employer and the union—but most notably that of the latter—had been considerably strengthened.

Although the Court affirmed the Missouri Supreme Court's ruling on concurrent jurisdiction, Justice White's opinion nevertheless concluded that the union had not breached its duty of fair representation. A breach of the union's duty, the Court said, was to be measured against the standards first set forth in *Steele, Tunstall* and *Huffman,* that is, whether the union's conduct toward the employee was arbitrary, discriminatory or in bad faith.[58] The Missouri Supreme Court had erroneously determined the union's liability on

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Union. Step four is a meeting between Swift's general superintendent and representatives of the National Union. If the grievance is not settled in the fourth step, the National Union is given power to refer the grievance to a specified arbitrator. *Id.*

53. *Id.* at 175.
54. *Id.* at 173.
55. *See supra* note 40 and accompanying text.
56. Sipes v. Vaca, 397 S.W.2d 658, 666 (Mo. 1965).
57. *Vaca,* 386 U.S. at 174.
58. *Id.* at 177.

the basis of the merits of Owens' grievance against his employer.[59] Furthermore, if the proper standard had been applied, the union's conduct in suspending Owens' grievance against his employer would not have constituted bad faith.[60] However, many of the Court's pronouncements emerged in the form of dicta. Even though Owens had not named his employer as a codefendant in the suit against the union, the Court chose to embark on an extended discussion of the mechanics of section 301 suits by an employee against his employer.

Justice White, writing for a five member majority, posed a hypothetical dilemma for the wrongfully discharged employee whose union has failed to process his grievance in good faith. If the bargaining agreement conferred sole power on the union to invoke arbitration, and the union has wrongfully refused to process the grievance, then the employer might attempt to raise the exhaustion defense of *Republic Steel* against any actions brought by the employee.[61] Such a result would, of course, be inherently unjust. As Justice White explained:

> It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice.[62]

The remedy supplied by the Court would operate as follows:

> [W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based on the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.[63]

This, then, was the essence of the *Vaca* decision. Moreover, al-

59. *Id.* at 189-90.
60. *Id.* at 193-94.
61. *Id.* at 184-85.
62. *Id.* at 185-86.
63. *Id.* at 186.

though it was couched in language which appeared to reflect a concern for the employee's "remediless" circumstances, the fact nevertheless remained that, after *Vaca,* such an employee would not be able to sue his employer without first proving that his union had breached its duty of fair representation. Given the severity of the elements of proof required of the employee to establish the union's breach—conduct which was arbitrary, discriminatory or in bad faith—*Vaca* left the employee with some formidable obstacles to relief.[64]

Those difficulties notwithstanding, the Court approached the issue of damages in the concluding paragraphs of the opinion. Once an employee was able to prove both his wrongful discharge by the employer *and* the union's wrongful refusal to process his grievance—clearly no simple task—how would liability then be apportioned between the two defendants?

Justice White's appraisal of the question was greatly influenced by his perception of the employer as the party seminally responsible for the employee's damages. Even in the face of the union's own breach, he wrote, "there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay."[65]

Reemphasizing the employer's original responsibility for the employee's lost wages, Justice White stated:

> Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. . . . It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages.[66]

Furthermore, if any doubt remained about the size of the "employer's share of the damages," it was resolved in the opinion's final paragraph: "In this case, even if the Union had breached its duty, *all or almost all* of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift."[67]

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64. For a discussion of *Vaca*'s burden on the individual employee, see Comment, *Individual Control Over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559 (1968).

65. *Vaca,* 386 U.S. at 196.

66. *Id.* at 197 (footnote omitted).

67. *Id.* at 198 (emphasis added).

It would not be unfair, therefore, to say that *Vaca*'s principle of "apportionment" of damages was an apportionment largely in name alone.

IV. FROM *Vaca* TO *Bowen*: INTERIM CASES

In the years between *Vaca* and *Bowen*, the Court delivered only a handful of opinions which had any significant bearing on the development of the apportionment principle. Three years after *Vaca*, in *Czosek v. O'Mara*,[68] the Court addressed the extent of the union's liability for any "increases" the union might have caused in the damages of a wrongfully discharged employee. The union in *Czosek* had been left holding the bag, as it were, after the employee's complaint against his employer had been dismissed.[69] The union claimed error in the dismissal, "[a]pparently fearing that if sued alone [it would] be forced to pay damages for which the employer [was] wholly or partly responsible."[70]

Such fears, said the Court, were groundless. Even when sued independently by a wrongfully discharged employee, the union's liability for the employee's loss of employment would be measured only by the extent to which its refusal to process the grievance had "added to the difficulty and expense of collecting from the employer."[71] In short, so long as the union's breach operated independently of the employer's act of wrongful discharge, the employer would be exclusively liable for backpay.[72]

The issue of backpay narrowed considerably in Justice Stewart's concurring opinion in *Hines v. Anchor Motor Freight, Inc.*[73] The majority held (again through Justice White) that an employee could seek relief against his employer even in the face of an adverse decision from an arbitration committee, provided the employee could prove that the decision had been "tainted" by the union's breach of duty.

The employees in *Hines* had been discharged by their employer

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68. 397 U.S. 25 (1970).

69. The district court had dismissed the complaint on the grounds that, under the RLA, the employee could have processed his own grievance. *Id.* at 26-27. His employer was therefore able to successfully raise the exhaustion defense.

70. *Id.* at 28-29.

71. *Id.* at 29.

72. *Id.*

73. 424 U.S. 554 (1976). By the time of the *Hines* decision, and with the exception of Justice O'Connor, the members of the Court who would eventually decide *Bowen* were fully assembled. The gradual shift in membership since *Vaca* would have a critical effect on the *Bowen* outcome. *See infra* note 111 and accompanying text.

on allegations that they had padded motel receipts during overnight travel.[74] Maintaining their claim of innocence throughout the grievance proceedings, the employees suggested to the union that an investigation be made of the motel.[75] The union responded merely with "assurances that 'there was nothing to worry about' and that they need not hire their own attorney."[76] Although it later developed that the motel clerk may indeed have been the responsible party, the employees' discharge was upheld by the arbitration committee due to the lack of any new evidence to support the employees' claims.[77] The employees then brought suit in federal court under section 301 against both their employer and their union, claiming that the union had breached its duty of fair representation by making no effort to verify the truth of the employer's charges.[78]

Since the collective bargaining agreement contained a provision which made the decision of an arbitration committee "final and binding on all parties,"[79] the issue before the Court was whether the bar of finality could be lifted when the decision was "tainted" by the union's breach of duty. The Court held that, just as the union's breach of duty removed the exhaustion requirement, so, too, would any bar of finality be lifted when the integrity of the arbitration process was seriously undermined.[80] In essence, this meant that even when the employer relied on the decision of the arbitrator—as he was required to do—he might still be held liable to the employee in order to provide the employee with an "appropriate remedy."[81]

While the majority failed to elaborate on exactly how the "appropriate remedy" was to be measured, Justice Stewart stated his own recommendation quite clearly:

> Liability for the intervening wage loss must fall not on the employer but on the Union. Such an apportionment of damages is mandated by *Vaca*'s holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the

74. *Hines*, 424 U.S. at 556.
75. *Id.* at 557.
76. *Id.*
77. *Id.* at 558.
78. *Id.*
79. *Id.* at 559.
80. *Id.* at 567.
81. *Id.* at 572.

> union's refusal to process the grievance should not be charged to the employer." . . . To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.[82]

Although similar reasoning would eventually prevail in *Bowen*,[83] the Court nevertheless continued in the intervening years to reinforce the rationale behind *Vaca*. Reiterating the concern it had expressed in *Vaca* over the union's ability to withstand the hardship of certain forms of liability,[84] the Court ruled in *International Brotherhood of Electrical Workers v. Foust*[85] that unions could not be held liable for punitive damages. A further obstacle to relief from the employer was removed in *Clayton v. UAW*,[86] when the Court held that an employee was not required to exhaust intra-union appeals which could neither afford him complete relief nor reactivate his grievance. But when the *Bowen* majority began to deal with the problems of precedent, it was the union's interpretations of *Vaca* and *Czosek* which presented the greatest obstacles. In that regard, at least, the facts of *Bowen* arrived on something of a silver platter.

V. *Bowen v. United States Postal Service*: THE RATIONAL CLARIFICATION

Previous Supreme Court opinions, with the notable exception of Justice Stewart's concurrence in *Hines*, discussed *Vaca*'s standard of apportionment in terms which had been anything but specific.[87] This failure to particularize may have been due in some part to the complicating presence of other collateral issues which were not insignificant in their own right. In *Bowen*, however, the issue of ap-

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82. *Id.* at 573 (Stewart, J., concurring) (citation omitted).

83. Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983). "It would be . . . unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct." *Id.* at 595 (footnote omitted). Curiously, however, the *Bowen* majority made no explicit mention of Justice Stewart's concurrence in *Hines*. *But see id.* at 601 n.3 (White, J., concurring and dissenting).

84. *Vaca*, 386 U.S. at 197.

85. 442 U.S. 42 (1979).

86. 451 U.S. 679 (1981).

87. *See Vaca*, 386 U.S. at 198 ("all or almost all" of employee's damages attributable to employer); *see also Foust*, 442 U.S. at 57 (Blackmun, J., concurring) ("bulk of the award will be paid by the employer").

portionment of damages—and that issue alone[88]—was squarely before the Court.

Bowen, an employee of the United States Postal Service, had been suspended without pay after an altercation with a coworker in February 1976.[89] As a member of the American Postal Workers Union, Bowen filed a grievance in accordance with the terms of the bargaining agreement.[90] Despite the recommendations of the local union officer, "the national office, for no apparent reason, refused to take the matter to arbitration."[91]

Bowen brought suit in federal court against both the Postal Service and the union, claiming wrongful discharge by the Postal Service in violation of the bargaining agreement and a breach by the union of its duty of fair representation.[92] The judge instructed the jury to apportion compensatory damages between the Postal Service and the union in the event that both were found liable. The judge further suggested the manner in which such damages might be equitably apportioned: the damages accumulated before the date at which Bowen would have been reinstated by the Postal Service had the union arbitrated his grievance would be the responsibility of the Postal Service, and the damages accumulated after that date would be paid by the union.[93] The jury returned the special verdict in favor of Bowen, finding a total of $52,954 in compensatory damages for lost benefits and wages.[94] Based on an "ar-

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88. *See infra* text accompanying notes 106-08.

89. *Bowen*, 103 S. Ct. at 590.

90. *Id.*

91. *Id.* at 591.

92. Bowen v. United States Postal Serv., 470 F. Supp. 1127 (W.D. Va. 1979). Technically, Bowen's suit did not arise under § 301 of the Labor Management Relations Act, but rather under the Postal Reorganization Act § 1208(b), 39 U.S.C. § 1208(b) (1976). Section 1208(b) "is identical to § 301 in all relevant respects." 103 S. Ct. at 600 n.2 (White, J., concurring and dissenting).

93. *Bowen*, 103 S. Ct. at 591.

94. *Id.* at 592. The jury also found punitive damages against both the union and the Postal Service in the amounts, respectively, of $10,000 and $30,000. *Id.* at 591 n.4. Those awards were set aside by the trial court as against both defendants, however, since the court felt it unfair to assess such damages against the union when the Postal Service could, and did, raise a plea of sovereign immunity. 470 F. Supp. at 1131. Less than three weeks after the district court's ruling in *Bowen*, the Supreme Court handed down its decision in *Foust*, 442 U.S. 42 (1979), prohibiting punitive damages against unions, and the issue in *Bowen* was not appealed.

Additionally, the Postal Service was directed to reinstate Bowen within 60 days of the trial court's decision or face further liability in the amount of $125,000 for Bowen's future loss of earnings. Attorney's fees of $20,000 were apportioned between the Postal Service and the union in the amounts, respectively, of $15,000 and $5,000. 470 F. Supp. at 1131. Only the issue of backpay reached the Supreme Court.

bitration date" of August 1977, the court ruled that the union would be liable for $30,000 and the Postal Service for the remaining $22,954.[95] Both the Postal Service and the union appealed.

Citing *Vaca,* the Fourth Circuit reversed the district court only as to the damages award against the union, and held that liability for backpay was the exclusive obligation of the Postal Service.[96] The court, however, refused to increase Bowen's award against the Postal Service to cover the entire $52,954. Since Bowen had failed to cross-appeal on the damages amount against the Postal Service, he was left with only $22,954 after the decision by the court of appeals.[97]

The Supreme Court reversed the Fourth Circuit's decision and held instead that the union was indeed primarily liable for a portion of the employee's lost wages. Justice Powell, writing for five members of the Court,[98] dismissed the union's arguments that the employer was solely liable for backpay, and that the union itself was "liable only for Bowen's litigation expenses."[99] Such an interpretation of *Vaca,* the Court declared, failed to take into account the unique nature of the relationships and interests created by the collective bargaining agreement.[100]

In fact, the Court's opinion did much to alter the manner in which those interests, particularly the union's, would be dealt with in the future.[101] Although focusing to some extent on the "para-

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95. *Bowen,* 103 S. Ct. at 592.

96. Bowen v. United States Postal Serv., 642 F.2d 79, 82 (4th Cir. 1981).

97. *Bowen,* 103 S. Ct. at 592 & n.7.

98. The *Bowen* majority was comprised of Justices Powell, Brennan, Stevens, O'Connor and Chief Justice Burger. A strong dissent was authored by Justice White, who was joined by Justices Marshall, Blackmun and, in part, by Justice Rehnquist, who also filed a separate dissent which was limited to the issue of Bowen's failure to cross-appeal the amount of damages awarded against the Postal Service.

99. *Bowen,* 103 S. Ct. at 593.

100. *Id.* at 594.

101. In the first year following the Court's decision in *Bowen,* the case has been cited primarily for one of two reasons.

First, of course, the case has taken its place as the most recent in the line of Supreme Court decisions dealing with employee suits against both the employer and the union, and has been referred to for the various general principles which have been developed therein. *See, e.g.,* DelCostello v. International Bhd. of Teamsters, 103 S. Ct. 2281, 2285, 2290 (1983) (rejecting the use of state limitations periods which might otherwise circumvent employees' recovery in § 301/fair representation cases); Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 907 (6th Cir. 1983) (importance of compensating individual employees for violation of rights); Curtis v. International Bhd. of Teamsters, 716 F.2d 360, 361 (6th Cir. 1983) (quoting *DelCostello*); Foster v. Bowman Transp. Co., 562 F. Supp. 806, 818 (N.D. Ala. 1983) (cited with *Foust* as authority for prohibition of punitive damages against union).

Second, the new rule of apportionment has been cited not only as a guide for the alloca-

mount importance" of the employee's "right to be made whole,"[102] the Court directed much of its discussion to the causal relationship between the union's breach and the corresponding increase in the employee's damages. Selecting quotations from *Vaca*, the Court carefully assembled a line of logic that led directly to the union.

Casting the risk of understatement to the wind, the Court acknowledged that *Vaca* had indeed placed a certain emphasis on the employer's original responsibility for the employee's dilemma, but that *Vaca* had also pointed out that the breakdown in the grievance process would not have occurred were it not for the fault of the union in its breach of duty.[103] Therefore, stated Justice Powell: "The fault that justifies dropping the bar to the employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach. To hold otherwise would make the employer alone liable for the consequences of the union's breach of duty."[104]

The above quoted language, of course, might well have surfaced in *Vaca* without creating so much as a ripple of surprise. One commentator, for example, has suggested that the method of apportionment ultimately adopted in *Bowen* "is required by any rational reading of the *Vaca* governing principle."[105] Justice White, on the other hand, himself the author of the *Vaca* opinion, found no lack of room for disagreement on that point in his strong dissent to the *Bowen* decision. But where *Vaca*'s principle emerged as dictum, the opinion in *Bowen* is informed and secured by a strong foundation of fact. As mentioned earlier, this did much to ease the arrival of the issue before the Court.

Both the employer and the union, in contrast to previous cases, were before the Court as parties whose liability had already been firmly established. Neither could claim that the employee had

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tion of damages between employer and union, Pitts v. Frito-Lay, Inc., 700 F.2d 330, 335 n.5 (6th Cir. 1983), but also in discussions of its effect on the union's conduct as a participant in § 301 litigation, Lewis v. American Postal Workers Union, 561 F. Supp. 1141, 1146 (W.D. Va. 1983) (opinion by Chief Judge Turk, author of district court decision ultimately affirmed in *Bowen*, questioning validity of certain pre-*Bowen* rationales concerning possible collusion between union and employee).

102. *Bowen*, 103 S. Ct. at 595.

103. *Id.*

104. *Id.*

105. Linsey, *supra* note 4, at 679. As mentioned at the outset of this note, any attempt before the *Bowen* decision to rely on the express language of *Vaca*'s principle would have been more misleading than instructive. *See supra* notes 5-8 and accompanying text. Ironically, it would seem that the original language is far more supportive of the result in *Bowen* than in *Vaca*.

failed to exhaust internal remedies; Bowen had apparently filed his grievance in accordance with required procedures. The Court's task was further simplified by the completely arbitrary manner in which the union had refused to take Bowen's grievance to arbitration. As Justice Powell noted, the Court was not confronted with a question of "whether there were degrees of fault."[106] Indeed, the district court had found both defendants to have acted in "reckless and callous disregard" of Bowen's rights.[107] Finally, neither Bowen's employer nor the union had induced or participated in the other's wrongful conduct.[108] Were that not the case, of course, an assessment of joint liability might then have been the appropriate remedy to apply.

Yet Justice White remained unconvinced, and perhaps understandably so, at least as far as precedent was concerned. The weight of *Vaca*'s rationale and its subsequent applications clearly supported the idea of minimal liability for the union.[109] In light of those prior decisions, the dissent not only would have affirmed the court of appeals as to the Postal Service's exclusive liability for backpay, but would have increased the award against the Postal Service to include the entire amount of Bowen's damages.[110] It is difficult, however, to agree completely with the spirit of the dissent's contentions. Certainly Justice White's interpretation of precedent carries the highest integrity—he had, after all, authored the opinions in *Vaca, Czosek* and *Hines*. But if Justice Powell and others in the *Bowen* majority had previously joined Justice White in those earlier opinions,[111] it now became clear that their decisions in those cases, and in *Hines*, particularly, had been motivated by other, more immediate, issues than the apportionment of damages. At any rate, three members of the *Bowen* majority, Justices Powell, Stevens and O'Connor, had not even been on the Court at the time of the *Czosek* ruling on union liability.

However, the dissent's arguments were not limited solely to the weight of precedent. Rejecting the role of deterrence, for example, in any consideration of union liability, the dissent emphasized the

106. *Bowen*, 103 S. Ct. at 599 n.19.

107. *Id.*

108. *Id.* at 595 n.11.

109. *Id.* at 602 (White, J., concurring and dissenting).

110. *Id.* at 607.

111. Justices Powell and Brennan had joined Justice White in the *Hines* opinion (Justice Stevens having taken no part in its consideration or decision). Of the members involved in the *Bowen* decision, only Justices White and Brennan had taken part in the Court's decision in *Vaca*.

risk of endangering limited union funds if the union was held liable for the "bulk" of the employee's backpay.[112] Similarly, the disproportionate amount of time between the hypothetical arbitration date and the final resolution of a court suit would subject the union to liability "far greater than that of the employer, the extent of which will not be in any way related to the union's comparative culpability."[113] Moreover, the dissenters were concerned that the union was powerless to remedy the employee's dilemma—"only the employer had the continuing ability to right the wrong and limit liability by reinstating Bowen."[114]

While these criticisms are not without merit, the *Bowen* majority would seem to have the benefit of the better arguments. First, even the staunchest defender of a union's financial stability would have to consider the other potential nonmonetary costs of maintaining that stability in the manner suggested by the dissent. Notwithstanding the frequently declared but nebulous goal of industrial peace, there would still remain the question of preserving the union's integrity in the eyes of its members. It would be difficult to say with any certainty that holding a union liable for its portion of backpay damages would fail to serve as a justifiable incentive for the prompt and efficient processing of grievances.[115] Second, Justice White's concern over the disproportionate time span between the hypothetical arbitration date and the final resolution of the employee's suit—"the better part of a decade"—is based largely on cases which have been taken all the way to the Supreme Court.[116] Furthermore, the district court in *Bowen* had cut off the union's liability as of the date of the jury verdict, and in fact had assessed damages incurred after the trial against the Postal Service, which had refused to reinstate Bowen.[117]

Finally, the *Bowen* majority was correct in its recognition that it was dealing with much more than "a simple contract of hire governed by traditional common law principles."[118] The dissent urged that the employer, as the breaching party to the "contract," should be held responsible for the total damages "even though there were

112. 103 S. Ct. at 602 (White, J., concurring and dissenting).
113. *Id.* at 603.
114. *Id.* at 604.
115. *See* Martucci, *supra* note 4, at 111.
116. *Bowen*, 103 S. Ct. at 603 (White, J., concurring and dissenting).
117. *Bowen*, 470 F. Supp. at 1129, 1131.
118. *Bowen*, 103 S. Ct. at 594.

contributing factors other than his own conduct."[119] Such a position, of course, ignores the paramount role given the grievance procedure in the Court's previous constructions of federal labor policy. Since the time of the *Steele* decision, in which the union's duty of fair representation was first announced, the Court has held fast to the goal of the prompt and orderly settlement of labor disputes. The grievance procedure has consistently been acknowledged as the preferred means of achieving that goal. Clearly, the *Bowen* majority viewed its decision as an incentive for the union to help further that objective.[120]

VI. CONCLUSION

The Supreme Court's interpretation of *Vaca*'s principle of apportionment, both as it was conceived and as it was subsequently applied, has been characterized by a marked policy of insulating unions from liability.[121] Critics of the Court's methods, writing on a theme of accountability, have emphasized the need for a determination of liability through an analysis based on causation.[122] In its long-delayed application of a rational reading to the language of *Vaca*'s "governing principle," the *Bowen* Court has adopted precisely that rationale. The employer will no longer be held exclusively liable for backpay damages in cases where the union has also breached its duty to the employee. By holding the union responsible for those backpay damages which the employee would have earned but for the union's breach, the Court has reaffirmed its traditional commitment to internal grievance procedures as the preferred means of resolving labor disputes. If the Court's analysis is correct, its decision should act as an incentive for the union to comply with such procedures.

It may be that the very facts which provided the *Bowen* Court with such a clearly defined framework for apportionment could easily serve to limit the application of the rationale in future cases.[123] The decision to hold the union responsible for its share of

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119. *Id.* at 603 (White, J., concurring and dissenting) (quoting 5 A. CORBIN, CORBIN ON CONTRACTS § 999 (1964)).

120. *Bowen*, 103 S. Ct. at 597.

121. *See* Martucci, *supra* note 4, at 112-19.

122. *Id.* at 119-20; *see also* Linsey, *supra* note 4, at 678.

123. Indeed, the Court concluded its opinion with a caveat in its final footnote:

> We need not decide whether the District Court's instructions on apportionment of damages were proper. The Union objected to the instructions only on the ground that no back wages at all could be assessed against it. It did not object to the manner of apportionment if such damages were to be assessed. Nor is it necessary

backpay damages was delivered on a five-four vote, and that in the face of a complete refusal by the union to even consider the employee's grievance. The extent of the Court's commitment to the new rationale in future fact patterns—resembling, for example, the "tainted" situation in *Hines*—remains to be tested.[124]

VAN CATTERTON

in this case to consider whether there were degrees of fault, as both the Service and the Union were found to have acted in "reckless and callous disregard of [Bowen's] rights."

Bowen, 103 S. Ct. at 599 n.19.

124. See *supra* note 101 for discussion of cases that have arisen since *Bowen*.